SUPREME COURT, U. S.

JUN 7 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1423

JOSEPH VICTOR CUSUMANO and SIDNEY M. HARMON,
Petitioners,

v.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JACKSON A. WRIGHT
227 University Hall
Columbia, Missouri 65201
Attorney for Respondents

Of Counsel
MARVIN E. WRIGHT
JAMES S. NEWBERRY
RICHARD S. PADEN
227 University Hall
Columbia, Missouri 65201
ROBERT NEILL, JR.
705 Olive Street
St. Louis, Missouri 63101

St. Louis Law Printing Co., Inc., 813 Olive Street 63101 314-231-4477

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Respondents pray the Court to deny the application for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered December 17, 1974.

QUESTIONS PRESENTED

1. Did the Eighth Circuit Court of Appeals err in holding that a teacher is not constitutionally entitled to reasons for his non-reappointment and a hearing in respect thereto where a Univer-

sity has formal, written, published Tenure Regulations and a non-tenured teacher is given a terminal one year contract in complete compliance with the Tenure Regulations and there is no claim of impermissible reasons and no charge against the teacher that might damage his standing and associations in his community and there is not imposed upon him any stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities?

2. Is the opinion of the Eighth Circuit Court of Appeals in this matter in conflict with other Circuit Court of Appeals decisions or in conflict with applicable decisions of the United States Supreme Court?

STATEMENT OF THE CASE

Lest there be confusion arising from the reference in Petitioners' Statement of the Case to a dismissal on the fourth day of October, 1972 (Page 6 of Petition for Writ), the Respondents will set forth a chronological description of the events in this matter.

On June 22, 1972, the Petitioners instituted an action in the United States District Court for the Eastern District of Missouri. This action bore Docket Number 72 C388(2). This action culminated in a dismissal without prejudice by the Honorable John C. Regan, District Judge. The Orders involved took place on October 4, 1972 and November 15, 1972. Judge Regan's Orders concerning the first case in this matter are set forth on pages A-28 through A-33 of the Petition for Writ.

A year later on October 3, 1973, Petitioners instituted another action in the United States District Court for the Eastern District of Missouri. This action bore Docket Number 73 C668(1) with the case being assigned to Honorable James H. Meredith,

District Judge. Thereafter on November 20, 1973, Petitioners were granted leave to file an Amended Complaint. This case resulted in a dismissal with prejudice by Judge Meredith. Judge Meredith's Order and Memorandum are set forth on pages A-1 through A-8 of the Petition for Writ. This last case is the one that was appealed to the Eighth Circuit Court of Appeals and the judgment rendered by the Eighth Circuit Court of Appeals is the subject of the present Petition before this Court for Writ of Certiorari.

It should also be noted that although the Petitioners are presenting their Petition for Writ of Certiorari pro se that they were represented by counsel in the proceedings up through the appeal to the Eighth Circuit Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT

Respondents do not believe this to be a case justifying the granting of a writ of certiorari to the Supreme Court of the United States.

1. It is an established fact that since March 10, 1950 the University of Missouri has had formal, written, published Academic Tenure Regulations (See Exhibit "A" Addendum to Appendix C.A.8 and pages A-34 through A-57 of the Petition for Writ). It is equally clear that the terminal one year contracts issued to Petitioners completely complied with the Tenure Regulations. (See pages A-5 through A-7, A-15 through A-17, and A-38 through A-39 of the Petition for Writ). It is patent on the face of Petitioners' Amended Complaint that there are no allegations of impermissible reasons such as abridgement of freedom of speech or discrimination on the part of the University. (See pages 5 through 9 and 12 through 16 of the Appendix C.A.8). It is obvious that the University made no charges against either of the Petitioners that might damage his standing and associations in his community or impose upon him any stigma or other disability that would foreclose his freedom to take advantage of other employment opportunities. This is obvious because the Petitioners' present frustrations arise from the lawful refusal of the University to give any reasons for the University's actions in issuing terminal one year contracts to the Petitioners. It is further obvious that no incriminating charges have been made against the Petitioners as the portion of the Tenure Regulations, Section 4F, that cover the rationale for not giving reasons for non-reappointment clearly states as follows. "The non-reappointment of any appointee on term appointment shall carry no implication that either his work or his conduct has been unsatisfactory. For this reason it shall not be necessary for his dean or department chairman to provide him with any statement of causes or reasons for not recommending reappointment." (See page A-41 of Petition for Writ).

The recital of the foregoing undisputed circumstances in the instant case clearly shows the decisions of the District Court and the Eighth Circuit Court of Appeals were made, and properly so, upon the decision of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed.2d 548, 92 S. Ct. 2701, since the Roth decision is factually and legally directly in point with the instant case.

2. The second question set forth in the Respondents' Brief relates to conflicts in opinions of the various Circuit Court of Appeals and the possible conflict with an applicable opinion of the Supreme Court.

A. The Petitioners, to support their assertion that a conflict exists between the decision in the instant case by the Eighth Circuit Court of Appeals and other Circuit Court of Appeals, cite the following cases: *Drown v. Portsmouth School District*, 435 F.2d 1182 (1st Cir. 1970) Cert. Denied, 402 U.S. 972; *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Francis v. Ota*, 356 F. Supp. 1029 (D.C.D. Hawaii, 1973); *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969); and *Pred v. Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851 (5th Cir. 1969).

The simple answer to the inapplicability of the foregoing decision of various Circuit Courts of Appeal is the fact that they were all decided prior to June 29, 1972. The prior conflicts in the opinions of the various Circuit Courts of Appeals relating to employment relationships between teachers and schools were thankfully laid to rest with the decisions by this Court in *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S. Ct. 2694 and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S. Ct. 2701, which were decided June 29, 1972. The only case cited by Petitioners that was decided after *Sinderman*, supra, and *Roth*, supra, is the case of *Francis v. Ota*, supra, which is a decision of the United States District Court of

Hawaii. An opinion of a District Court is inappropriate authority to claim that a conflict exists between different Circuit Courts of Appeals on a given subject which must be shown under Rule 19(b) of the Supreme Court Rules.

B. Another ground to substantiate a review on certiorari under Rule 19 of the Supreme Court Rules is when a decision of a Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of the Supreme Court. The Petitioners asserted that the Eighth Circuit Court of Appeals erred in distinguishing the case of *Perry v. Sindermann*, supra. (See page 3 of Petition for Writ). This is an apparent reference to that portion of the opinion of the Eighth Circuit Court of Appeals found on page A-18 of the Petition for Writ wherein the Court noted that "The entire thrust of the Tenure Regulations is to avoid the 'de facto' tenure hypothesized in *Sinderman*, supra, 408 U.S. at 602." The Court then quotes from Section 3B of the Tenure Regulations which states that, "Holders of academic staff positions under term appointments shall have no rights of permanent or continuous tenure." Of equal effect would be Section 12 of the Tenure Regulations (See page A-48 through A-51 of Petition for Writ) which required anyone claiming existing implied tenure rights at the time of the adoption of the Regulations to prove them up or be forever barred from making such claims and anyone not then having tenure would thereafter be governed by the provisions of Section 4 of the Tenure Regulations.

The distinguishing of *Perry v. Sindermann*, supra, by the Eighth Circuit was completely proper because as was pointed out in point 1 above, the instant case is controlled by the decision in *Roth*, supra, thus the Eighth Circuit made the same distinction as made by this Court when it decided *Sindermann*, supra, and *Roth*, supra.

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

JACKSON A. WRIGHT
227 University Hall
Columbia, Missouri 65201
Attorney for Respondents

Of Counsel

MARVIN E. WRIGHT
JAMES S. NEWBERRY
RICHARD S. PADEN
227 University Hall
Columbia, Missouri 65201

ROBERT NEILL, JR.
705 Olive Street
St. Louis, Missouri 63101